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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 57.

RAILROAD COMMISSION OF TEXAS, ET AL., *Appellants,*

v.

HUMBLE OIL & REFINING COMPANY, *Appellee.*

BRIEF FOR APPELLANT, G. A. SADLER.

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BRIEF FOR APPELLANT, G. A. SADLER.

OPINION BELOW.

The opinion of the United States District Court for the Western District of Texas (a three-judge court) is not reported. An informal statement was made orally by the Court on February 21, 1940, (R. 564) and findings of fact and conclusions of law were entered on March 20, 1940. (R. 573)

JURISDICTION.

The jurisdiction of this Court is invoked under Sections 238 and 266 of the Judicial Code, as amended by the Act of February 13, 1925. (U. S. Code, Title 28, Sections 345 and 380) The judgment here appealed from was dated March 19, 1940, and was filed on March 20, 1940. (R. 570) The appeal was allowed in this case by an order of the Dis-

trict Court entered on April 1, 1940. (R. 596) The record was filed in this Court on April 19, 1940, and the order noting probable jurisdiction was entered on June 3, 1940.

STATEMENT.

This suit was brought by the Humble Oil & Refining Company, the Appellee, against the State authorities, including Appellant G. A. Sadler as a member of the Railroad Commission of Texas and as an individual, to obtain temporary and permanent injunctive relief against the enforcement of the proration Orders of the Railroad Commission of Texas relating to the East Texas field, on the ground that these Orders are not "on a reasonable basis" as required by statute and deprive it of its property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. There being no diversity of citizenship upon which to bottom jurisdiction, the Court is faced solely with the question of the reasonableness and validity, when challenged by appeal to the Fourteenth Amendment, of the proration Orders insofar as they apply to the respondent's wells.

(a) Proceedings Below.

This suit was heard by the District Court prior to the decision of this Court in *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company*, 60 S. Ct. 1021, 84 L. Ed. 983, which was a suit involving similar issues and an earlier proration order of the Commission. The instant suit was heard jointly with a second suit by the Rowan and Nichols Oil Company on behalf of a lease not hitherto involved; this second *Rowan* case is now on appeal in this Court as *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company*, No. 218, October Term, 1940.

A preliminary injunction was granted to the Humble Oil and Refining Company on August 11, 1939, against the enforcement of the proration Order dated June 19, 1939. (R. 38) This Order was the same in substance as the pro-

ration Order subsequently upheld by this Court on June 3, 1940, *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company, supra.* No appeal was taken. As in that case, the Commission was not only temporarily enjoined from enforcing its Order but likewise from interfering with the Appellee's producing oil currently in an amount which is in the same proportion to the total allowable production as the estimated recoverable oil under its leases is to the estimated recoverable oil under the field as a whole. (R. 40)

After duly scheduled hearings by the Commission at which evidence was taken with reference to the advisability of changing the proration Order, a new Order was promulgated on September 11, 1939, and subsequently was readopted in the State-wide Order of September 29, 1939. While these Orders increased the allowable production for the Appellee, they did not increase it to the degree demanded by the Appellee and the Appellee charged they had the same infirmity as the earlier Orders. However, upon filing and hearing of a supplemental complaint (R. 41) a second interlocutory judgment was denied on November 30, 1939. (R. 69)

Hearing on the prayer for a permanent injunction was opened on February 13, 1940,* and on February 21, 1940, the District Court announced that it would enter judgments in behalf of both the Humble and the Rowan and Nichols companies permanently enjoining the enforcement of the Orders and the method of proration they embodied. (R. 564)

The Commission having decided to appeal, final judgment was entered on March 20, 1940, permanently enjoining the defendants from enforcing or executing the Order of the Railroad Commission, but the Court granted a stay for a period of 60 days from the date of the judgment to permit the perfecting of this appeal. (R. 570) Upon the

*It was stipulated that it would be necessary to amend the pleadings to contain the subsequent orders periodically issued by the Commission embodying substantially the same method of proration.

filing of this appeal, this Court in turn granted a stay pending the determination of the case.

(b) Orders in Issue.

The Orders of June 19, 1940, were substantially identical with those at issue in the first *Rowan* case. (R. 9) The total field allowable was set, and then was distributed among the wells as follows. All wells incapable of producing more than twenty barrels a day were allowed to produce to capacity in accord with the Marginal Well Law. Then all wells in the field were granted a minimum allowable of twenty barrels; thus, no good, flowing well was curtailed below the minimum established by law to protect the marginal wells. The balance of the field allowable thus determined was allocated to the more productive wells by multiplying the factor of 2.32 per cent to the hourly potential of the wells, so that those wells whose hourly potential multiplied by 2.32 per cent totalled more than twenty barrels per day received an hourly allowable graduated up from twenty barrels daily to about twenty-six barrels daily. Because of the limited allowable for the field as to the amount which it is possible to produce without waste and because of the large number of wells still producing, about 98 per cent of the total allowable was allocated on a per well basis.

The subsequent Orders of September 11, 1939, (R. 473) and of September 29, 1939, (R. 476)* likewise maintained the twenty barrel a day factor in the proration formula but instead of the straight potential basis of allocating the balance of the field allowable, they provided a formula giving weight to the factors of potential, bottom hole pressure and sand thickness. Under these Orders, only about 75 per cent of the total allowables was consumed by allocations on the twenty barrels per well basis. (R. 582) In this respect,

*The Order of January 24, 1940, the last Order before the trial of this case continued to reenact this method of proration. (R. 487)

these Orders are more favorable to the larger and more productive properties than were the earlier Orders which were passed on favorably in the first *Rowan* case.

(c) Basis for Appellee's Attack.

The Appellee's leases "cover" approximately 14,656 surface acres in the field, or about 11.4 per cent of the producing acreage. While the leases are scattered, some on the west and some in the east, most of its leases are located in the center of the field, in the so-called "fairway". (R. 577) It estimates that its leases originally contained approximately 14.3 per cent of the acre-feet of net oil sand in the field and that at the present time it still holds 14.3 per cent of the acre-feet. (R. 577) As in the first *Rowan* case, Appellee has contended that it is legally entitled to recover currently an amount of oil which is in the same proportion to the total allowable for the entire field as the estimated "recoverable" oil underneath its leases is to the estimated "recoverable" oil under the field as a whole. Hence, it contends that it is entitled to allocations for its leases amounting to 14.3 per cent of any total daily field allowable. (R. 11, 45) Under the June Orders attacked, Appellee's allowable amounted to 9.932 per cent of the total daily field allowable while, under the September Orders attacked, Appellee's allowable was raised to 11.17 per cent of the total daily field allowable. (R. 582) It contends therefore that currently it is being deprived of the privilege of producing 3.13 per cent of the field allocation, and that this is unreasonable and confiscatory.

The Appellee attacked the Orders of the Commission on the ground that they do not allocate allowable production to its leases "on a reasonable basis" as required by statute (Tex. Rev. Civil Stats., 1925, Art. 6049c) and as a consequence the Orders result in confiscating the oil of the Appellee. The Orders are not "on a reasonable basis" because they are bottomed on a formula giving weight to physical factors other than simply the ratios of estimated

acre-feet of reserves. The Commission denies that the Orders are not valid and reasonable and alleges that by virtue of the various factors in its proration formula all properties in the field, including those of the Appellee, will recover substantially the equivalent of the oil in place in the various properties. (R. 53)

In the Court below only excerpts rather than the entire Record were introduced by the Appellee before the Commission. Independent testimony was introduced by the Appellee, some of it at variance with its testimony before the Commission. The Commission introduced expert testimony in its defense. The Court below, prior to the decision here in the first *Rowan* case, adopting the Appellee's estimates (R. 577) and following its line of reasoning, (R. 583) found the Orders discriminated against the Appellee. It found that this was due to the large percentage of the field allowable distributable by the twenty barrel per well factor. (R. 583) It found the allocation of twenty barrels per well to be arbitrary, unreasonable and confiscatory in violation of the Fourteenth Amendment. (R. 585) Injunction was therefore granted.

SPECIFICATION OF ERRORS.

The three-judge District Court erred:

1.

In holding that the proration Orders of the Railroad Commission of Texas of September 11, 1939, September 29, 1939, and January 24, 1940, and the schedules issued in connection therewith for the East Texas field, as interpreted, applied and enforced against the plaintiff, are unreasonable, discriminatory, confiscatory and void as to plaintiff.

2.

In holding that the Orders of the Railroad Commission of September 11, 1939, September 29, 1939, and January

24, 1940, and the schedules issued in connection therewith for the East Texas field, as interpreted, applied and enforced against plaintiff, do not allocate the production in the field on a reasonable basis, as required by the statutes of the State of Texas.

3.

In holding that the Orders of the Railroad Commission of September 11, 1939, September 29, 1939, and January 24, 1940, and the schedules issued in connection therewith for the East Texas field, as interpreted, applied and enforced against the plaintiff, operate to confiscate plaintiff's property and unreasonably discriminate against plaintiff, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States.

4.

In holding that the Order of the Railroad Commission of June 19, 1939, for the East Texas field, and the schedules issued in connection therewith, as interpreted, applied and enforced against the plaintiff, were unreasonable and void as to plaintiff and did not allocate the production in the field on a reasonable basis as required by the Texas statutes.

5.

In holding that the Order of the Railroad Commission of June 19, 1939, for the East Texas field, and the schedules issued in connection therewith, as interpreted, applied and enforced against the plaintiff, deprived the plaintiff of its property without due process of law and denied to it the equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

6.

In holding that the plaintiff is legally entitled to recover currently an amount of oil which is in the same proportion to the total allowable for the East Texas field as the esti-

mated recoverable oil underneath the plaintiff's lease is to the estimated recoverable oil under the East Texas field as a whole.

7.

In holding that the plaintiff is currently suffering immediate and irreparable injury from the enforcement of the orders of the Railroad Commission of September 11, 1939, September 29, 1939, and January 24, 1940.

8.

In holding that the plaintiff is without an adequate remedy at law to protect itself against alleged losses to the plaintiff under the program of regulation attacked in this action.

9.

In holding that the right to apply to the Commission for permission to drill additional wells as exceptions to the spacing rules of the Railroad Commission does not constitute an adequate remedy whereby the plaintiff can protect itself against loss and increase its share in the allowable production from the East Texas field.

10.

In holding that the plaintiff is entitled to injunctive relief from the Court, although plaintiff wholly failed to allege or prove that it had applied to the Railroad Commission for permits to drill additional wells upon its leases, or that the Railroad Commission had refused to grant it such permits.

11.

In holding that plaintiff has exhausted its administrative remedy before seeking injunctive relief from this Court.

12.

In permanently enjoining the defendants from enforcing or attempting to enforce the proration orders and sched-

ules complained of against the plaintiff and its properties in the East Texas field.

13.

In permanently enjoining the defendants from enforcing or attempting to enforce the proration orders promulgated by the Railroad Commission of Texas on September 11, 1939, September 29, 1939, and January 24, 1940, and the schedules issued in connection therewith for the East Texas oil field, and any other Orders having substantially the same effect.

14.

In finding, without sufficient evidence to support said finding, that the plaintiff has been permitted in the past to recover only 11/15ths as much oil per acre foot of its oil sand depleted as the field as a whole has been permitted to produce per acre foot of sand depleted.

15.

In finding, without sufficient evidence to support said finding, that the plaintiff is currently deprived of an opportunity to produce 3.13 per cent of the field scheduled allowable or about 3.19 per cent of the field's actual allowable.

16.

In finding, without sufficient evidence to support said finding, that there is no good reason why a minimum per well allowable of 20 barrels per day is necessary in prorating the allowable production of the East Texas field.

17.

In finding, without sufficient evidence to support said finding, that a reasonable method of distribution of the allowable production in the East Texas field can be made without using any per well minimum allowable.

18.

In finding, without sufficient evidence to support said finding, that the properties in the "fairway" of the East Texas field, except those which are very densely drilled, are being and will be severely drained by the leases lying in the eastern part of the field.

19.

In finding, without sufficient evidence to support said finding, that the proration orders attacked by the plaintiff do not afford to properties in the "fairway" of the East Texas field an opportunity currently to recover their fair share of the oil.

20.

In finding, without sufficient evidence to support said finding, that under the proration orders attacked by the plaintiff the properties in the "fairway" in the East Texas field will probably not ultimately be allowed an opportunity to recover substantially the equivalent of the recoverable reserves under them.

21.

In finding, without sufficient evidence to support said finding, that it is not necessary to restrict "fairway" properties and wells in order to protect the west side and east side properties from drainage.

22.

In finding, without sufficient evidence to support said finding, that most pumping wells in the East Texas field can be operated at a profit on a daily production of as little as five barrels each.

23.

In finding, without sufficient evidence to support such finding, that if pumping wells, producing water, should be

closed in by a restriction of their daily allowable, practically all of the recoverable oil in the tract on which such wells are located would be produced by other wells and no substantial waste would result from the abandonment of such wells.

24.

In finding, without sufficient evidence to support such finding, that practically all wells in the field have been drilled more than two years and have produced more than a sufficient amount of oil to pay for the cost of drilling, equipping and operating such wells.

25.

In finding, without sufficient evidence to support such finding, that the loss to the plaintiff under the present method of proration amounts to "a very large figure daily".

26.

In finding, without sufficient evidence to support said finding, that the loss to the plaintiff under the present method of proration will probably amount to "an enormous figure" over a period of years if the program be continued.

27.

In finding, without sufficient evidence to support said finding, that, under the operation of the present program of proration in the East Texas field, the plaintiff's share in the allowable will not increase in the future as properties on the west side of the field are depleted.

28.

In finding, without sufficient evidence to support said finding, that the orders of the Railroad Commission attacked by the plaintiff result "in a daily loss of many thousand barrels of oil worth many thousand dollars" to plaintiff.

29.

In finding, without sufficient evidence to support such finding, that a well drilled in the East Texas field will effectively drain an area of at least ten acres.

30.

In the rendition of the final judgment in this action filed and entered March 19, 1940.

SUMMARY OF ARGUMENT.

(1) The decision of the Court below, made prior to the decision by this Court in *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company*, 60 S. Ct. 1021 (1940), should be reversed under the doctrine of *stare decisis*.

(2) The action of the Court below in substituting its judgment for that of the Commission, acting under legislative authority, was in error and the decision below finding the Order of the Commission in violation of the Fourteenth Amendment should be reversed. The only issue present here is whether the action of the administrative body is reasonably designed to carry out the approved legislation since if the administrative action conforms to the statute whose constitutionality has been determined, there can be no new constitutional issues. In such a case the Court cannot substitute its findings for those of the Commission.

(3) Even if the Court below should have made an independent finding, it erred in finding the Order of the Commission unreasonable. The burden of proof is upon the complaining party and the Appellee failed to prove conclusively that the Commission's action was unreasonable and arbitrary. The Appellee's calculations of its reserves and their depletion with resulting losses to it are inconclusive and contrary to its own testimony which indicates no material losses. The formula for proration it advocates, accepted by the Court below, denies to some pro-

ducing areas a right to the oil in place or its equivalent and adds to those of the Appellee migratory oil, giving it more than oil in place. Appellee failed to show conclusively that the control factor of twenty barrels per well in the Commission's Order was arbitrary and unreasonable. Having failed to sustain the burden of proof, the Appellee should have been denied injunctive relief.

ARGUMENT.

I.

The Decision of this Court in Railroad Commission of Texas v. Rowan and Nichols Oil Company is Controlling in this Case Under the Doctrine of Stare Decisis.

Subsequent to the decision by the three-judge District Court in this case, this Court handed down its decision in *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company*, 60 S. Ct. 1021, 84 L. Ed. 983 (1940). In that case this Court upheld proration Orders of the Commission. The Commission's procedure in this case has been the same as in this first *Rowan* case. The Orders themselves in the two cases are substantially the same and the basis for attack by the Appellee in the two cases is practically identical.*

"The Commission has observed established procedure" (*Rowan* case, *supra*, p. 1024). The Orders in each case were promulgated after notice and hearing. No objection is made on the ground of either improper notice or hearing.

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*In neither case was there any diversity of citizenship. This Court held only the question of constitutionality to be before the federal tribunal. *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company*, 60 S. Ct, 1021, 1024, 84 L. Ed. 983, 985. However, the test for validity of the reasonableness of the basis for a proration Order is substantially the same as that for the constitutional issue as stated in the first *Rowan* case, *supra*. *Gulf Land Company* v. *Atlantic Refining Company*, 134 Tex. 57, 131 S. W. (2d) 73. And the District Court below in considering also the question of the validity of the Order under the State statute so treated it. (R. 566)

(R. 468) No objection is made that the Commission did not consider all the relevant evidence presented. The Appellee concedes that its evidence was introduced in evidence at duly scheduled hearings (R. 335, 338) and that Appellee filed its protest to proposed Orders and stated its reasons to the Commission. (R. 337)

Each Order in this case "is but one more item in a continuous series of adjustments". (*Rowan* case, *supra,* p. 1026) Each Order, promulgated after hearing, is the best balance that could be struck by the Commission "with the complicated and subtle factors that must enter into such judgments" based upon the evidence then before it. The Order of June 19, 1939, is practically identical with the Order at issue in the first *Rowan* case (*supra,* p. 1021). The Orders of September 11, 1939, made changes but basically the differences were in the weighting given to the factor of twenty barrels per well and in the method of distributing the balance of the field allowable (*supra,* p. 4). Insofar as these Orders differ from the preceding ones, the change is in favor of the properties of the Appellee in this case. Whereas 98 per cent of the total allowable was prorated on the twenty barrel per well factor in the *Rowan* case, under the later Orders only 75 per cent of the total allowable was thus prorated. The weight given to bottom hole pressure, acreage and sand thickness likewise favor leases such as those of the Appellee less densely drilled than the average and on the fairway. The Appellee thus obtained a substantial increase in its total allowable.

It was conceded that the Order of September 11, 1939, was "substantially the same" as the earlier Order (R. 335) and that up to trial the "formula for the distribution among wells has been the same". (R. 338) While the same formula was used, the top allowable and number of shut down days has varied somewhat, and the shut down was subsequently applied to the statutory marginal wells. (R. 338) Such differences as there have been in the Orders since the first *Rowan* case have been merely interstitial adjustments.

The combination of factors in the proration formula "is in itself a question for administrative and not judicial judgment". (*Rowan* case, *supra*, p. 1022) Acting under legislative authority, the Commission in this case, as in the *Rowan* case, rejected the system of proration based solely upon estimated recoverable reserves as proposed by the Appellee. Appraising the conflicting expert testimony, with its own background of expert knowledge and study "of inferences bordering on conjecture", the Commission continued to follow the formula, the basic provisions of which were approved in the *Rowan* case and which it determined to be "on a reasonable basis". One of the fundamental factors in the proration formula in this case, as in the *Rowan* case, is the twenty barrel allocation per well. This Court has already found that the Commission's adoption of this factor is not "unnatural"; it has already considered the "conflict of expertise" over this issue, and has already decided the issue in favor of the Commission.

This case falling within the four corners of the decision in the first *Rowan* case, the decision below should be reversed and the injunction be denied under the doctrine of *stare decisis.*

II.

The Court Below Erred in Substituting Its Judgment for that of the Commission, Acting Under Legislative Authority, and Therefore Finding the Commission's Order Offensive to the Fourteenth Amendment.

The legislature of Texas in the exercise of its police power enacted conservation laws which provide for proration of oil production. *Texas Revised Civil Statutes, 1925, Art. 6014 et seq.* These conservation laws admittedly drastically affect property rights protected against confiscation by the Fourteenth Amendment. It is uncontested that under the common law of Texas the Appellee is the owner of the *oil in place** under its leases and

*Where gas is found with the oil the principle is, of course, applicable to the gas as well.

is entitled to produce only its oil in place or its equivalent. *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290; *Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717; *Lemar* v. *Garner*, 121 Texas 502, 50 S. W. (2d) 769; *Humphreys-Mexia Co.* v. *Gammon*, 113 Texas 247, 254 S. W. 296; *Thuss, Texas Oil and Gas* (2d ed.), p. 16; 1 *Summers, Oil and Gas* (2d ed.), sec. 62, p. 124; *Hardwicke, on Texas in "History of Conservation of Oil and Gas, A Symposium"* (*American Bar Assoc., Mineral Section*), pp. 238-243.

Prior to the conservation laws, the means of producing the oil in place was governed by the common law Rule of Capture. From the earliest cases in which the Rule of Capture was embodied, the Courts have recognized the correlative rights of owners of a pool. Under the then limited knowledge of the geologic facts concerning oil accumulation and production, the Courts held that ratable taking from a common reservoir of oil was to be achieved by permitting each producer to produce whatever he could from his own wells, drilled as he deemed fit. Other producers protected their correlative rights by drilling off-set wells and producing headlong to prevent drainage by their neighbors. Thus the ability of one to capture was limited by the ability of all others simultaneously to capture. It was an attempt to establish a self-operating principle which would accord each producer his fair share of oil in a pool. *Prairie Oil and Gas Co.* v. *State of Texas*, 231 S. W. 1085; *Stephens County* v. *Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 254 S. W. 290; *Houston & T. C. Ry. Co.* v. *East*, 98 Texas 146, 81 S. W. 279; *Texas Co.* v. *Daugherty*, 107 Tex. 226, 176 S. W. 717; *Waggoner Estate* v. *Sigler Oil Co.*, 118 Tex. 509, 19 S. W. (2d) 27; *Marshall and Meyers, "Legal Planning of Petroleum Production,"* 41 Yale Law Journal 33 (1931); *Hardwicke, "Rule of Capture and Its Implications as Applied to Oil and Gas,"* 13 Tex. Law Rev. 401.

The conservation laws substitute a new rule of law governing the taking of oil. Primarily anti-waste measures,

they provide a new and more equitable rule of law regulating production both in the interests of conservation and in protecting the correlative rights of all producers in the field. The power of the legislature to subject the property of private interests to regulation whether primarily because of the public interest in conservation or in behalf of the owners of oil in the common reservoir is delimited by the Constitutional safeguards prohibiting the deprivation of property without due process of law.

This legislation has therefore been subject to judicial review. And as Chief Justice Hughes stated in *St. Joseph Stock Yards Co.* v. *U. S.*, 298 U. S. 38, 53, 56 S. Ct. 720, 726:

> "Moreover, as the question is whether the legislative action has passed beyond the honest limit of the permitted zone of reasonableness into the forbidden reaches of confiscation, judicial scrutiny must of necessity take into account the entire legislative process, including the reasoning and findings upon which the legislative action rests."

The conservation legislation providing for proration, subjected to the acid test of judicial review, has been found to be within the zone of reasonableness and not to have transcended the limits of legislative power. *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 52 S. Ct. 559; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8, 52 S. Ct. 103; *Amazon Petroleum Corp.* v. *Ryan*, 293 U. S. 388, 55 S. Ct. 241; *Sterling* v. *Constantin*, 287 U. S. 278, 53 S. Ct. 159.

The fact that there is adequate legislative power to establish a system of proration for oil production has therefore already been determined in the prior cases by this Court. In this case, the constitutionality of the statute is conceded, (R. 22) and it is clear (*supra*, p. 13) that all the procedural requirements of due process have been met. *Cf. St. Joseph Stock Yards Co.* v. *U. S.*, Mr. Brandeis concurring, 298 U. S. 38, 73, 56 S. Ct. 720, 735. The only issue present here is whether the action of the administrative

body is reasonably designed to carry out the approved legislative policy* since, if the administrative action conforms to the statute whose constitutionality has been determined, there can be no new constitutional issue.

The Texas statute provides that

> "the Commission shall distribute, prorate, or otherwise apportion among the various producers on a reasonable basis." Texas Revised Civil Statutes, 1925, Art. 6049c.

Proration "on a reasonable basis" has uniformly been interpreted as proration designed to accord each producer in a field opportunity to obtain the oil in place beneath his lease. *Gulf Land Co.* v. *Atlantic Refining Co.*, 134 Tex. 57, 131 S. W. (2d) 73, 80; *Henderson* v. *Terrell*, 24 Fed. Supp. 147; *Brown* v. *Humble Oil and Refining Co.*, 126 Tex. 296, 83 S. W. (2d) 935.

Inasmuch as the legislative authority to prorate has been upheld as not being confiscatory, the Order by the Commission carrying out the legislative dictate, where there is weight to support the findings, is valid. The Orders at issue were promulgated by the Commission in the light of evidence duly presented in hearings. The Court below made an independent determination and substituted its findings for those of the Commission as to the reasonableness of a single factor in the proration formula. (R. 585) It erred in thus finding the Order of the Railroad Commission, acting under legislative authority, offensive to the Fourteenth Amendment. *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company, supra; S. C. Highway Dept.* v. *Barn-*

*This is the fundamental difference between this case and *Thompson* v. *Consolidated Gas Co.*, 300 U. S. 55, 57 S. Ct. 364. In that case the Order of the Railroad Commission attempted to prorate the market for gas. The Court found that such regulation, unlike that in the case here, has no reasonable relation either to prevention of waste or the protection of correlative rights; that the statute, if it provided for such proration, was invalid, as was an Order which so construed the statute.

well Bros., 303 U. S. 177, 191, 58 S. Ct. 510; *Pacific States Box and Basket Co.* v. *White*, 296 U. S. 176, 56 S. Ct. 159. Even though the Court below reached a different conclusion from that reached by the Commission, it cannot substitute its own order for the administrative order if there is a rational basis for the order adopted by the Commission. *Cf. Rochester Tel. Corp.* v. *U. S.*, 300 U. S. 297, 57 S. Ct. 466; *Mississippi Valley Barge Line Co.* v. *U. S.*, 292 U. S. 282, 54 S. Ct. 692. The decisions are uniform in this regard. Even in "rate cases" in which the Court has found it necessary to make special exception for independent judicial determination of issues of fact bearing upon a constitutional right, the Court clearly differentiates between this type of determination and those of an administrative body acting under a statute, admittedly constitutional, but requiring the exercise of trained discretion. In *St. Joseph Stock Yards Co.* v. *U. S.*, *supra*, this Court said (p. 51):

> "When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91; *Virginian Ry. Co.* v. *United States*, 272 U. S. 658, 663; *Tagg Bros. & Moorhead* v. *United States*, *supra*, p. 444; *Florida* v. *United States*, 292 U. S. 1, 12. In such cases, the judicial inquiry into the facts goes no further than to ascertain whether there is evidence to support the findings, and the question of the weight of the evidence in determining issues of fact lies with the legislative agency acting within its statutory authority."

III.

The Orders of the Commission Are Not Unreasonable, Arbitrary or Confiscatory, and Give to the Appellee a Fair Chance to Recover the Oil Under Its Leases, or Its Equivalent.

Physical structure of East Texas field. There is little disagreement concerning the physical structure of the East Texas field. A general geologic description of the field is set out in detail in the findings by the Court below. (R. 575) For purposes of this case it is essential to note that in cross-section from east to west the field is roughly triangular in shape with top and long side tilting upward to the east. The upper and right side are formed by impervious rock. The lower western side, beginning at the middle of the field, is an oil-water face with water pressing in under great pressure. The drive of the water furnishes the chief reservoir energy of the field, and it is one of conservation's chief functions to maintain the pressure.

With the drilling of wells, pressure differentials are created propelling the oil to the surface; the pressure moving water in to displace the oil. Pressure gradients are thus set up from west to east. Consequently, the wells on the west are the first to be drowned out by the water and are comparatively short lived. Where production from the western wells has not produced all the oil in place before water penetration, the drive of the advancing water has forced a migration of the oil eastward, draining the western part to replenish the middle of the field as oil has been produced from it. Meanwhile, wells in the thin, tight sands on the east are relatively short lived, due primarily to the pressure drop in the field. As the pressure in the field has dropped wells on the eastern edge of the field have gone dead. About two-thirds of the abandonments of wells has occurred on the western side of the field and one-third on the east side. (R. 391)

The fairway in the center of the field, having the greatest sand thickness, has the longest life expectancy and

stands to benefit by the gradual abandonment of outlying wells. Part of the fairway is underlain by water and will naturally be drowned out in due course before the part to the east. In the fairway and to the east where there is no water, oil produced has been replaced by oil drained to the property in front of the advancing water. In this area there is still as much oil in place as there was when the field was discovered, while in the western part of the fairway some water as well as oil has replaced oil withdrawn. 6,921 acres of the 14,65[illegible] acres held under lease by the Appellee are east of the wa[illegible]e in the fairway. (R. 95)

As the total number o[illegible] wells decreases due to a shrinking of the producing area, the more fortunately situated wells still enjoy the full benefit of the reservoir energy since the total optimum withdrawal from the field will be made through the steadily decreasing number of wells in the shrinking area; over a period of time wells in the fairway area will receive a markedly increased daily allowable over their prolonged life due to proration.

Basis of Appellee's case. The Appellee charged that it is not recovering its fair share of oil. This claim is based upon the assumptions (1) that it holds approximately 14.3 per cent of the net acre-feet of oil sand, (2) that it is entitled to produce currently in the ratio of its current oil reserves to the current oil reserves of the entire field (R. 3), and that (3) not being permitted to produce on this basis, it "loses" the difference between the proportion it claims of 14.3 per cent and that allowed by the Commission; hence that its properties are depleted by the extent of its "losses". In short, it claims that having produced 131,364,982 barrels (R. 116) of an estimated total production of 1,365,000,000 barrels (R. 115, 136, 578) or 9.6 per cent of the total that it has "lost" 4.7 per cent of the past production of the field. Similarly, since the Appellee, under the latest Order here in issue, is permitted to produce 11.17 per cent of the current allowable instead of the 14.3 per cent, it claims that it is losing 3.13 per cent of the current production. (R. 583)

Projecting the latest Order here in issue into the future, it calculates that its loss of the total estimated recoverable oil would be about 100,000,000 barrels. (R. 144) The Appellee conceded, however, that the relative longevity of its properties would result in an increasing percentage of the field allowable being allocated to it, therefore it scaled this figure down to somewhere between 45,000,000 and 85,000,000 barrels (R. 145) admitting these calculations to be subject to considerable chance of error. (R. 168) However, the Appellee "loses" these gigantic quantities of oil only if its leases are actually depleted by the amounts of the alleged losses; otherwise it is merely a question of timing as to when the Appellee takes the oil from beneath its leases.

The Appellee has not maintained the burden of proving the Orders of the Commission are unreasonable. It is an established principle that in challenging the validity of administrative Orders, the complaining party carries the burden of clearly establishing confiscation. *Los Angeles Gas Corp.* v. *Railroad Commission,* 289 U. S. 287, 305, 53 S. Ct. 637, 650; *Lindheimer* v. *Illinois Telephone Co.,* 292 U. S. 151, 169, 54 S. Ct. 658. And "there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing". *Darnell* v. *Edwards,* 244 U. S. 564, 569, 37 S. Ct. 701, 703. The Appellee has failed to prove conclusively any one facet of its case:

(1) *The Appellee fails to prove conclusively that it has and had 14.3 per cent of the recoverable oil reserves.* The Appellee's entire case is predicated upon an ability to determine accurately the acre-feet of net oil sand, both in its leases and in the field as a whole. Appellee's contention as to its proportionate holdings in the field rests upon the testimony of two witnesses. (R. 80, 132) It is upon the basis of their studies of relative sand thicknesses and quantity of sand in the field as a whole and under Appellee's leases that Appellee claims 14.3 per cent of the "net effective sand" beneath its leases. The detailed calculations, however,

from which an administrative body or the Court could judge the accuracy of the conclusion reached were not introduced.* Repeated attempts upon cross-examination to obtain the detailed figures failed (R. 102, 188, 125) until finally the Court below said (R. 125):

> "Judge Sibley: It is your job to get ready to meet witnesses that don't agree with you about things. We are in the trial. This witness states in his opinion the depletion has been such and so spread that it averages just the same in percentage of what they still have in the sand. That is his opinion. He can't swear to that like somebody that saw something that transpired. He hasn't got the figures here, and can't back his opinion up with those details, so you will have to drop it right there, as far as he is concerned, I think."

However, the burden of proof is not upon the Commission but upon the Appellee. In subsequent testimony, Appellee's chief witness in support of another position stated that estimates of acre-feet were "subject to some inherent errors". (R. 191, 194) Since the basic data was not introduced, and since the estimates of acre-feet are unreliable, the Appellee has failed to sustain the burden of proving the major assumption in its case.

(2) *The Appellee's leases have not been depleted to the extent of the alleged losses.* While the field has been depleted by the withdrawal of an estimated 1,365,000,000

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*The importance of specific figures is vital in view of the fluidity of such data in the hands of the experts for the Appellee. In the hearing before the Commission on August, 1939, the Appellee estimated there were 5,208,000 acre-feet in the field. In the Court proceedings in February, 1940, this figure had shrunk 234,000 acre-feet to 4,974,000. (R. 192) In estimating Appellee's depletion, its engineers in August, 1939, found it to be 147,000 acre-feet but in February, 1940, the total had changed to 120,000 acre-feet. (R. 456) Another witness in opposition to the Commission in the trial of this case estimated the total oil reserves in the field to be 1,000,000,000 barrels more than he had in the hearing of the first *Rowan* case. (R. 305)

barrels (R. 115), it does not follow that the Appellee's leases were depleted by 14.3 per cent of that amount, assuming the accuracy of the ratio. As the oil has been depleted, it has been supplanted by water. Consequently, the actual depletion has occurred primarily under the leases to the west. There has been no depletion under those 6,921 acres held by the Appellee east of the water line. (R. 95) The determination of the depletion of the Appellee's leases is not a matter of striking field wide averages but of determining the actual decrease in oil bearing sands beneath Appellee's leases and of comparing the amount of depletion with the amount of actual production by the Appellee.

The highest estimate of actual depletion claimed by the Appellee is 120,026 acre-feet. (R. 334)* Witnesses for the Appellee agree that past recovery from the field has been about 1,100 barrels per acre-foot. (R. 136, 188, 333) Multiplying 120,026 acre-feet by 1,100 barrels gives 132,028,600 barrels as the amount of depletion from the Appellee's leases. Witnesses for Appellee testify that it has produced about 131,364,982 barrels. (R. 116, 137, 578). It is apparent that *on its own figures* the Appellee has produced approximately all the oil which has been withdrawn from its leases. There has been little if any drainage to date from its leases.

When confronted by this simple arithmetic, witnesses for the Appellee declared the figures they presented were "subject to some inherent errors". (R. 191, 194) One explanation offered for the error was that there was "a substantial amount of oil" below the calculated water level (R. 192), which, in substance, means there were more acre-feet than estimated. Another explanation was that, although the Appellee produced only 1,100 barrels per acre-foot depleted, the rest of the field produced 1,499 barrels per acre-foot. (R. 328) This estimate, however, is in con-

*According to the figures of another witness for Appellee, it originally had 707,770 acre feet (R. 136) and now has 595,277 (R. 327), indicating a depletion of only 112,493 acre-feet.

flict with the testimony of expert witnesses on behalf of Appellee, the *Rowan* Company and the Commission.*

The Court below, finding that "competent petroleum engineers and geologists will agree fairly well concerning the amount of oil per acre-foot of net oil sand in place in the East Texas field" (R. 577), ignored this testimony, and adopted findings of depletion estimated by the Appellee's claimed proportion of 14.3 per cent. (R. 578) However, the figure of 14.3 per cent itself is predicated upon the determination of the acre-feet of net oil sand and the amount of oil per acre-foot therein being accurate. But witnesses for Appellee concede there is inherent error in their estimates of acre-feet, an essential factor in estimating the reserves. The Appellee's and Court's findings therefore are bottomed upon "inherent error" and the burden of proof of confiscation has not been sustained.

(3) *The Appellee is not entitled to produce currently on the ratio of current reserves.* The method of proration advocated by the Appellee repudiates the basic law of ownership of oil in place. If this method were adopted, on each proration date new allowables would be predicated upon the new relationship between the reserves of Appellee's leases with the total reserves for the field. The Appellee's leases will produce 25 per cent longer than the average for the field. (R. 414) Thus by progressive stages, the Appellee would produce an ever increasing proportion of the field's reserves. (R. 194) Pressure gradients to the Appellee's leases in the fairway would be increased and oil would be drained from the lands on the west. More allowable to the fairway would mean less to the western and eastern edges and a proportionately larger utilization of the reservoir energy by the Appellee and other fairway producers. The depletion of the western and eastern portions

*Calculations by Appellee's witnesses were 1,100 barrels (R. 189, 333), by *Rowan* witness, 927.4 barrels. (R. 249) The Commission witness testified that in twenty years experience he had never heard of the recovery of 1,500 barrels per acre-foot. (R. 458)

of the field would be accelerated. Producers in those sections of the field would receive *less than oil in place* while the Appellee and others similarly situated would gain by migratory oil from the west, obtaining *more than oil in place.*

The Appellee is only entitled to the oil in place or its equivalent. The present proration Order is an attempt to so adjust producing schedules so that Appellee ultimately will receive all that it is entitled to while still giving it a fair proportion of current production.

(4) *The Commission's proration Order is not conclusively shown to be unreasonable.* The weight given to the factor of twenty barrels per well in the Commission's Order is chiefly responsible for the allotment of less than 14.3 per cent of the total allowable to the Appellee. This the Court below found to be discriminatory (R. 584) and it also found that the allocation of three-fourths of the field on a flat per well basis of twenty barrels was arbitrary and bore no relation to the prevention of physical waste. (R. 585) The Court below apparently felt that some minimum allowable could be made.* It indicated (R. 586) that a minimum of five or six barrels per well would be reasonable on the theory that the financial income would be enough to give a non-confiscatory return. Consideration of the physical problem of drainage from the leases because of too small a minimum was given little consideration.

Commission experts testified at length (R. 350, 358, 364, 403, 422, 435, 446) on the reasonableness of the minimum set by the Commission a) to prevent premature abandonment of wells, resulting in confiscation to their owners and an actual loss of oil, b) to permit small tracts to be drilled, c) to permit the more densely drilled western and eastern portions of the field to obtain their oil in place before the wells go dead, and d) to prevent waste. These

*Even the Appellee conceded the necessity of "prescribing a reasonable minimum unit of allowable". (R. 336) although there is question as to the meaning of unit. (R. 337)

basic reasons for the factor of twenty barrels per day were ignored. The Appellee took the position that in order to get its fair share of the oil, the minimum per well has to be cut and that a well can survive financially on five or six barrels per day. Testimony on this point, however, was not conclusive. The witness for Appellee who testified that a five barrel allowable is sufficient for an "average pumping well" (R. 181) admitted he did not know the operating costs of such well. (R. 182) Another witness in opposition to the Commission who testified that a five-barrel minimum allowable would be sufficient (R. 227) admitted his calculations did not include anything but operating costs. (R. 229) When shown that the gross for a pumping well with a five barrel allowable would not exceed ninety-five dollars per month, (R. 244) he retracted a statement that such an operation would result in a profit of $75 to $100 per month. (R. 230)

The Appellee has not sustained the burden of proving the twenty barrel per well factor arbitrary and beyond the discretion of the Commission.

Injunction, therefore, should have been denied.

It is not the purpose of this brief to carry the burden and to prove that the Order of the Commission is reasonable although the Record amply demonstrates that fact. Presumptiveley, the Order is reasonable since the Appellee has not conclusively proved the contrary.

CONCLUSION.

The decision of the Court below, made prior to the decision by this Court in *Railroad Commission of Texas* v. *Rowan and Nichols Oil Company*, 60 S. Ct. 1021, should be reversed under the doctrine of *stare decisis*.

For this and the other reasons stated, it is respectfully submitted that the judgment of the District Court for the Western District of Texas should be reversed.

Respectfully submitted,

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